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MICHAEL ROSEN, JR., CL.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-350

United States of America, Appellant

v.

SOUTH TAX COMMISSION OF THE STATE OF MISSISSIPPI,
ET AL.

On Appeal from the United States District Court for the
Southern District of Mississippi

BRIEF FOR THE APPELLEES

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INTRODUCTION

The three judges below correctly and unanimously held that the 21st Amendment required dismissal of the complaint, even if it be assumed that the federal government has tried to pre-empt for itself, by legislative action, the terms on which alcoholic beverages are purchased for resale by military agencies. 340

F.Supp. 903, 906. One judge wrote a concurring opinion suggesting another sound ground for dismissal. In his opinion, the United States is complaining about a non-injurious alcoholic beverage retailer's burden that the military clubs voluntarily assumed for their own benefit. 340 F.Supp. 903, 912.

While this case is here only by virtue of the 21st Amendment issue, we feel bound to discuss briefly the matters that preclude a reversal of the decision below upon any ground. These are the non-injurious nature of Mississippi's regulation and the lack of any requirement in the applicable federal statutes and regulations that the military clubs avoid compliance with the state's regulation.

Our main argument will show that this Court's 21st Amendment decisions require affirmance. However, to reach the 21st Amendment question this Court must overlook serious discrepancies between the case tried below and the case posited in the government's brief. The trial was had on a complaint, answer and stipulation of facts, sometimes ignored in that brief.

COUNTER STATEMENT OF QUESTION PRESENTED

No issue was tried as to Mississippi's right to control any conduct at any military base. An initial attempt to require the clubs to obtain retailer's permits was abandoned before the complaint was filed. Stipulation, par. 14, App. 38. For the purposes of this case the exclusive right of the federal government to control conduct on any military base was and is conceded.

The complaint's only contested claim of exclusive jurisdiction was that the federal government had exclusive jurisdiction to control the terms on which alcoholic beverages were sold to two of the four Mississippi bases

involved in the suit. Par. 4, App. 5. The answer denied this allegation (App. 14) and the stipulation as to these bases merely recites the documents relied upon by the United States to establish such exclusive jurisdiction. Par. 3, App. 28-29. None of these documents, all dated during 1942-50, when Mississippi was a legally dry state, even suggest an intention on the part of Mississippi or the United States to abrogate or qualify the right granted by the 21st Amendment in 1933 to control the liquor traffic within state borders. Mississippi did not and does not concede that it gave away any 21st Amendment rights it had before it enacted its Local Option Alcoholic Beverage Control Law of July 1, 1966. Paragraphs 11 and 12 of the stipulation merely recite that this law was enacted after all four of the bases in question were acquired (App. 7).¹

The complaint did not charge that any of the statutes or regulations involved, recited at paragraphs 13 through 19 (App. 7-9), had any different application at one base than another. The charge was that Mississippi is "prohibited by the Federal Constitution from regulating, taxing and otherwise controlling the procurement of liquor by instrumentalities of the United States located in the State of Mississippi." Par. 22, App. 9. The relief sought was a money judgment for a single total amount of all the markup payments made by all of those instrumentalities (Par. 3, Prayer, App.

¹ There is no reference in the stipulation to Sections 4153 and 4154 of the Mississippi Code, which appear in footnotes at pages 15-16 of the Government's brief. These sections deal only with federal acquisition of lands "for custom houses, post offices or other public buildings." They have nothing to do with federal acquisition of military bases.

10-11) and an injunction against future collection of the mark-up from any of them. Par. 2, Prayer, App. 10.

We submit that only a single constitutional question, if any, is presented by the government's appeal. Did the 21st Amendment authorize Mississippi to collect its wholesale mark-up on alcoholic beverage sales to military agencies for resale at bases in Mississippi?

ARGUMENT

I. The Complaining Clubs Were Not Burdened by the Challenged Regulation

The challenged regulation did more than apply a wholesaler's mark-up on military purchases for resale. It provided that all military orders "shall bear the usual mark-up in price but *shall be exempt from all state taxes.*" Emphasis ours. Stipulation, par. 11, App. 35. This exemption from the state's excise tax on distilled spirits was \$2.50 per gallon.²

We do not know from this record what actual prices were paid by the clubs to suppliers. We do know that neither the clubs nor the United States performed any wholesaler function. The only allegation of the complaint with respect to such functions is that Mississippi did not perform them on direct sales. Par. 17, App. 8. The only stipulation as to such functions is that Mississippi maintained the facilities needed for such functions, made them "available both to the military and other purchasers," was required by law to maintain them "whether they are utilized or not" and does

² Mississippi Code, 1942, Title 40, Sec. 102 65-104, headed Excise Taxes, levies a per-gallon tax, "to be collected from each retail licensee at the time of sale," of \$2.50 on Distilled Spirits, \$1.00 on Sparkling Wine and Champagne, and \$.35 on Wine.

not transport, store, distribute, or perform any other direct service connected with purchases made direct from distillers outside the state. Par. 13, App. 36. When such direct purchases were made, the distillers had to perform the necessary wholesaling service. They were willing to do so in return for the privilege of selling their products to the state for distribution through its private retailers and direct to military retailers without payment of any state taxes. Pars. 14-15, Stipulation, App. 36-38.

No supplier protested his obligation to collect and remit to the state its wholesale mark-up when the clubs exercised their option to purchase direct from them instead of from the state. The only protestants were the club purchasers, and their protests had no substance. The clubs were protesting the mark-up while accepting the tax benefit provided. They bought gin and whiskey at a price 50 cents a fifth cheaper than the private retailers paid for it, but still complained that it was unjust to charge them with a mark-up to cover wholesale services that had to be performed by someone else.

Moreover, the clubs deliberately avoided a test of the regulation's legality for more than five years.³ The government's attempt to repudiate its bargain was, and is, as Judge Cox held in his concurring opinion, a try for unjust enrichment.

³ This suit was not brought until more than three years after collection of the mark-up began. Docket Entries, App. 1. No motion was made for a preliminary injunction even then, and the defendants forced the trial by moving for a summary judgment. Ibid, App. 3.

II. No United States Statute or Regulation Requires Any Military Agency to Purchase Alcoholic Beverages Without Regard for State Law.

The applicable Defense Department Regulation requires cooperation between base commanders and state regulatory officials. Directive 1330. 15, Par. IV C1, App. 31-32. On June 9, 1966, that paragraph of the regulation was amended by deleting the requirement that alcoholic beverage purchases for resale be made "without regard to prices locally established by state statute or otherwise." Change 1 to Directive 1330. 15, App. 34. This left the directive requiring only that such purchases be made "in such a manner and such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered." App. 32. Mississippi's regulation did not become effective until September 1, 1966. App. 36.

In trying to prove that this amendment did not require those purchases to be made in accordance with Mississippi law, the government succeeded only in proving that the mark-up payments involved here were made in compliance with the government's own regulation.⁴ On April 15, 1966, Assistant Secretary of Defense Morris had proposed an amendment that would require price negotiations with state officials where the state was the only wholesaler and advised the Secretaries of the three military departments that a price "which results in an adequate profit to the installation

⁴ This alleged proof consists of self-serving Defense Department memoranda appearing at App. 44-57, that were attached as exhibits to paragraph 9 of the Stipulation, App. 34. They are plainly incompetent to prove any fact asserted by the United States. They do, however, contain admissions against interest that are usable by Mississippi.

is a satisfactory implementation of the policy of Section IV C.1. of DOD Directive 1330.15...." App. 43.

The stipulation shows that each of the Mississippi installations earned profits (Par. 19, App. 39-40) and no attempt was made to show that these profits were inadequate. Indeed the memorandum from the Navy to Mr. Morris of April 22, 1966, shows that in Michigan, Oregon, and Washington the naval installations were paying "net mark-ups over costs to state stores imposed upon Military Messes" of about 30%, 70%, and 45% respectively. App. 45. Yet Mississippi's maximum mark-up was only 20% of the supplier's price. The Navy did not say that those much higher mark-ups had prevented any of its installations in Michigan, Oregon, or Washington from earning an adequate profit.

The Navy's plea for resisting similar mark-ups in other states was simply that "the increased costs would be extremely detrimental to morale."⁵ App. 46. This concern with morale was more formally spelled out in the government's answers to Mississippi's interrogatories. These answers say that Mississippi installations couldn't pay the state's wholesale mark-up and still earn enough alcoholic beverage profits for entertainment and recreational purposes because higher resale prices than those prevailing in other states might make "service at installations in Mississippi less attractive than in other states...." Stipulation, par. App. 40-41.

The quoted answer is unconvincing because Section V B.3. of Directive 1330.15, requires all of the military

⁵ Like the Navy, the Army's only objection was that profit margins would be reduced or selling prices increased. App. 49. The Air Force was concerned only that "procurement should be on a competitive basis to the maximum practical extent." App. 51.

clubs' resale prices "to be within (10%) of the lowest prevailing rates of civilian outlets in the area." App. 33. No matter what state a military base is in, the club's prices are thus geared to private prices, and there is no escape for servicemen from the substantial price disparities that exist between states.

Mississippi's private retailers pay, in addition to the same wholesale mark-up as that paid by the military clubs, a Mississippi gallonage tax of \$2.50 a gallon on distilled spirits. Compliance with the federal regulation noted above, preventing resale prices more than 10% below private prices, meant that the Mississippi clubs could only charge lower resale prices that were roughly proportional to the club's lower purchase costs. Since the operating costs of the military clubs, usually rent-free, are obviously less than those of the private stores, the combined effect of the applicable state and federal regulations was to assure adequate profits for the clubs, as well as lower prices for their customers than private retailers charge.

Moreover, this regulation was not an exercise of the general constitutional powers conferred by the Supremacy Clause. It was issued pursuant to a federal statute that raised no constitutional question; Section 6 of the 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473. Stipulation, par. 6. App. 29-30.

There is no hint in its language or history that this law was meant to supersede state control of the terms on which alcoholic beverages are sold to military bases for resale. On its face it does no more than authorize the Secretary of Defense to make criminally enforceable liquor regulations "at or near" military bases that

would supplement state law.⁶ Its brief history demonstrates no purpose to supersede any commercial aspect of the system of state laws controlling the liquor traffic that was brought into being by the 21st Amendment.

Section 6 was an amendment adopted by agreement on April 13, 1951, minutes before the House passed the 1951 Draft Extension Bill, designated S 1, 82nd Congress. 97 Cong. Rec. Part 3, p. 3914. This amendment was offered by Congressman Cole of New York as a substitute for an amendment, offered a few minutes earlier by Congressman Bryson of South Carolina, that would have prohibited sale or possession of any beverage containing an alcoholic content of more than one-half of one percent at any selective service training camp. Ibid, p. 3902. Cole then offered his substitute amendment as better adapted to dealing with military alcoholic beverage problems, because Bryson's "applies only to the Training Corps and not to all camps and posts of the armed forces." Ibid, p. 3902. Bryson said that Cole's substitute amendment was agreeable to him. Cole's amendment was then adopted without any debate or vote. Ibid, p. 3902.

In adopting this routine amendment by agreement, the Congress could not have supposed that it was raising a 21st Amendment question. Any statement that the purpose of the Amendment was to allow military agencies to buy alcoholic beverages at cheaper prices than state law permitted, for resale by the drink or by

⁶ The Assimilative Crimes Act of 1948, 18 U.S.C. §13, had made violations of state law at military bases over which the United States had acquired "exclusive or concurrent jurisdiction," 18 U.S.C. § 7(3), punishable as federal crimes. The constitutionality of the Act's prospective application was sustained in *United States v. Sharpnack*, 355 U.S. 286 (1958).

the bottle, would have precipitated a spirited debate. There were then seventeen states⁷ that had preempted for themselves the retailing or wholesaling or both of alcoholic beverages as a source of income and control, who would certainly have been heard from.

As we shall show in the next section, the Court below correctly concluded that the 21st Amendment prevented such preemption of a vital state concern by the federal government. This view might well have prevented the enactment of Section 6, had its sponsor expressed the purpose argued here by the government. But this Court need not speculate as to why the Congress passed this 1951 legislation or why the Defense Department amended its regulation in June 1966.⁸ It is plain that the amended regulation, as interpreted by the Department itself, did not require avoidance of state purchasing requirements if they resulted in a price that would yield an adequate resale profit. Mississippi's regulation met that test and the protests that led to the government's suit had no lawful basis.

III. The 21st Amendment Authorizes Mississippi to Collect Its Wholesale Mark-Up on Alcoholic Beverage Sales to Military Agencies for Resale at Bases in Mississippi.

The government's constitutional argument affects more states than Mississippi. We therefore first indicate the practical contours of the constitutional questions the Court is being asked to consider. We then

⁷ Alabama, Idaho, Iowa, Maine, Michigan, Montana, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

⁸ A good reason for the June amendment not mentioned in the government's self-serving documentation was this Court's decision in *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 on April 19, 1966, and the denial of rehearing on May 31, 1966, 384 U.S. 967.

show that the government's argument is premised on a constitutional doctrine of intergovernmental tax immunity discarded by both the Congress and this Court long ago, and specifically rejected in this Court's decisions construing the 21st Amendment.

Mississippi is the latest of eighteen states to implement the powers granted in the 21st Amendment by making itself the exclusive wholesaler of distilled spirits and wine in the state.⁹ Most of those states are also the exclusive retailers of distilled spirits within their respective borders. The theory underlying all of these state laws is that they are an effective means of preventing undesirable commercial marketing practices while gaining maximum revenue for the state. The eighteen states that use this method of controlling the liquor traffic are collectively known as the monopoly or control states.

The other thirty-two states all control their liquor traffic by licensing requirements that are also designed to prevent marketing abuses and to assure collection of substantial revenues by the imposition of state excise taxes, commonly called gallonage taxes. They are collectively known as the license states.

The decision the government is asking this Court to make would deprive both license and control states of alcoholic beverage revenues that they have been collecting without challenge by the United States for almost forty years. The states are presently collecting millions of dollars annually, by way of excise taxes and wholesaler's mark-ups, upon sales made for resale at domestic military bases.

⁹ See page 10, footnote 7, for a list of the other seventeen.

These bases are not states in any 21st Amendment sense. The sponsors of that amendment would have been astounded by the government's assertion that domestic federal enclaves form a second system of controlling the liquor traffic, administered by the federal government. In addition to repealing the 18th Amendment (national prohibition) the 21st won a century-old struggle by the states against frustration of their control of the liquor traffic by repeated holdings of Commerce Clause supremacy. Cf. *Leisy v. Hardin*, 135 U.S. 100 (1890). Section 2 of this 1933 amendment therefore spelled out in the clearest possible terms the future supremacy of state control over commerce in alcoholic beverages. The assertion in the government's brief (p. 25) that it merely restored to the states their pre-18th amendment powers is not borne out by the cited senatorial remarks.

The government's brief neglects to note what the Senate debate it refers to was about. As originally submitted to the Senate, the amendment had a Section 3: "Congress shall have concurrent powers to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." Senator Wagner of New York showed that the system of dual state and federal control authorized by this section would revive most of the evils that the 21st Amendment was meant to abolish. 76 Cong. Rec. Part 4, pp. 4145-48. The Majority Leader, Senator Robinson of Arkansas, then proposed elimination of this section. *Ibid* p. 4171. After Senator Black of Alabama eloquently pointed out the practical impossibility of a dual federal-state system, Section 3 was eliminated (*Ibid.* pp. 4177-79).¹⁰

¹⁰ The House debates (76 Cong. Rec. Part 4, pp. 4508-29) throw no light on the purpose of eliminating the above quoted Section 3, because it had been deleted before the House considered the amendment.

The military control system has flourished in recent years only because the states themselves have been reluctant to use their full 21st Amendment rights in dealing with the Defense Department. That department has so many valuable trade and economic benefits to dispense that there are solid political and economic reasons for many state administrations to accommodate Defense Department demands having no basis in constitutional law.

There is no uniformity in state law and practice in dealing with military sales, even among the control states. Mississippi, Idaho, Michigan, Oregon, and Washington apply their respective wholesale mark-ups to such sales while the other thirteen control states do not. The license state with the most bases, California, collects excise taxes on such sales of distilled spirits and wine, but many license states do not.

We respectfully suggest that the failure of the United States to challenge the validity of this long-established collection of mark-ups and taxes between the adoption of the 21st Amendment and the time this suit was brought indicates a lack of merit in the government's argument that these collections violate the federal constitution. That argument assumes that Mississippi's mark-up is, in practical effect, an excise tax that cannot constitutionally be applied to sales made to military bases because the tax is included in the prices paid by military purchasers. The government is apparently seriously urging that this is an unconstitutional burden on national defense.

Even the shortest course in intergovernmental tax immunity teaches that the inclusion of state excise taxes in prices paid by the federal government is now a routine and constitutional burden that a federal system cannot avoid. Nearly sixty years ago the Court

rejected a claim that a state excise tax on insurance premiums was unconstitutional when included in the cost of surety bond premiums borne by the federal government. *Fidelity & Deposit Co. v. Pennsylvania*, 240 U.S. 319 (1916). We do not believe that the government itself has since made a similar claim before the instant case was brought.¹¹

There is no constitutional magic in the fact that the payments challenged here are included in prices paid by agencies of the government related to national defense. This Court's repudiation of prior federal immunity holdings during World War II should have laid that notion to rest. When the government urged that its enormous emergency base construction costs were being unconstitutionally inflated by the collection of state sales taxes from federal contractors, the Court upheld the application of these taxes to defense construction contracts, even though cost-plus terms forced their payment out of the federal treasury. This was found to be a normal and constitutional aspect of our federal system. *Alabama v. King & Boozer*, 314 U.S. 1, 9 (1941).

The general principles of intergovernmental tax immunity expressed in that case were specifically applied to military bases by a 1947 statute, popularly known as the Buck Act. 61 Stat. 641, 4 U.S.C. § 105, *et seq.* That federal statute authorizes the application of state sales and use taxes to all post exchange purchases of general merchandise occurring "in whole or in part within a federal area." 4 U.S.C. § 105(a). The Act exempts from such taxes only the "sale, purchase,

¹¹ The closest seem to be the arguments rejected in *Detroit v. Murray Corp.*, 355 U.S. 489 (1958), and *United States v. Boyd*, 378 U.S. 39 (1964).

storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser." 4 U.S.C. § 107(a). An authorized purchaser is one permitted to purchase "from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental secretary having jurisdiction over such branch." Emphasis ours. 4 U.S.C. § 107(b).

Since the only military purchases to which Mississippi's wholesale mark-up applies are purchases made from the state or from private suppliers, even if the mark-up is regarded as a sales tax, such an application has been approved by express congressional action. In short, the Buck Act declared a federal policy against state tax immunity that the government has misstated at page 29 of its brief.

The only recent intergovernmental tax immunity case relied upon by the government is *Agricultural National Bank v. Tax Commission*, 392 U.S. 339 (1968), cited at page 28 of the government's brief. In that case the Court's majority declined to reach the constitutional question of whether national banks were nontaxable by Massachusetts as federal instrumentalities. 392 U.S. 339, 341. The only judges who did reach that question all thought the state tax there involved was constitutional. 392 U.S. 339, 359.

No decision of this Court since the 21st Amendment has sustained a claim of intergovernmental tax immunity as to domestic commerce in alcoholic beverages. Yet the government argues that state excise taxes on liquor bought for resale at military bases are an un-

constitutional burden on national defense while state taxes that increase the cost of direct national defense expenditures are not.

The first 21st Amendment case to reject the theory of intergovernmental tax immunity advanced in the government's brief is *Ohio v. Helvering*, 292 U.S. 360 (1934). Ohio claimed that application of the federal excise tax to the liquor bought and sold by it, was an unconstitutional interference with the state's sovereignty since the liquor business in that state was conducted only by the sovereign. The Court rejected the claim by pointing out that when a state chooses to resell alcoholic beverages, even as Ohio did, both to raise revenue and to assure publicly beneficial control, the state becomes subject to non-discriminatory federal excise taxation of what it buys. When the reverse situation was presented in *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938), the Court held that California could collect its excise tax on all liquor sales made to a federal concessionnaire in Yosemite Park for resale there. 304 U.S. 518, 534-36.

The government's assertion that *Collins* "stands for the proposition that, in the absence of an express reservation, the state derives no power from the Twenty-first Amendment to regulate" the importation of liquor into "exclusive jurisdiction" bases (Brief, p. 19) is patently wrong. If, as the park concessionnaire claimed, the fact that he was acting as a federal agent on a federal enclave gave him a federal constitutional immunity from state excise taxation, whatever California said or did was immaterial. California either had a constitutional right to apply its tax or it didn't. If the federal constitution denied that

right, California couldn't create it, by legislation or otherwise.

The Court recognized in *Collins* that a constitutional policy precluding state control of conduct on federal enclaves has no sensible application to state control over sales of liquor made to such an enclave for resale there. This is California's unchallenged view of *Collins*. In dealing with alcoholic beverages sold to military bases, California draws no distinction based on the terms of cession. Section 32201 of California's Revenue and Taxation Code imposes an excise tax of two dollars per gallon on all sellers of distilled spirits "within areas over which the federal government has jurisdiction." All Army, Navy and Air Force bases are specifically exempted from beer taxes; in 1967, Marine and Coast Guard bases were also specifically exempted from such taxes. Section 32177. But the California excise tax on wine and spirits is applied indiscriminately to all military bases and other federal enclaves, without objection from the United States.¹²

This Court's unbroken line of decisions rejecting claims of immunity from State taxes on domestic liquor sales was continued this term in *Hueblein, Inc. v. South Carolina Tax Commission*, No. 71-879, — U.S. —, decided December 18, 1972. The slip opinion (p. 9-10) reaffirms this Court's prior broad construction of the 21st Amendment, as described in *Hostetter v. Idlewild*, 377 U.S. 324, 330 (1964), although the decision turned on the construction of a federal statute.

¹² In *National Distillers v. State Board*, 83 Cal. App. 2d 35, 187 Pae. 2d 821 (1947), a California appellate Court rejected the distiller's claim that whiskey bought by the Army for medical purposes was non-taxable by California.

The oddest aspect of the government's effort to overturn the cases denying state tax immunity to domestic liquor sales is the failure of its brief to suggest any reason of public policy or common sense for doing so. The government's legal argument comes down to a strange reliance on *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 347 (1964), argued and decided with the *Idlewild* case. The *Beam* case concluded, as did *Idlewild*, that the 21st Amendment had not repealed the Export-Import Clause of the constitution. Yet in *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the Court upheld a broad application of New York's right to control the prices at which liquor is bought in that state that impinged directly upon the Commerce Clause.

Seagram is still the most recent decision by this Court applying the 21st Amendment to domestic commerce. The Court held there that New York's law requiring each supplier to affirm that the prices at which it sold in New York were no higher than the prices it charged elsewhere in the United States did not violate the Commerce Clause, notwithstanding possible effects of the law on prices in other states. 384 U.S. 35, 43-45.

State liquor regulation cannot tightly confine its effects to one state any more than military liquor regulation can confine its effects to military bases. We have a federal system that permits all citizens to move freely in and among our states. We do not confine drinking by members of the armed forces to the military bases where they serve nor do we prevent them from enjoying nearby publicly available residential, educational and recreational facilities provided by the

taxpayers of the surrounding states. The armed forces have been allowed to operate in Mississippi as many base liquor stores as they think they need to provide money for special recreation facilities not made generally available to other citizens. Military personnel are not, however, a caste so privileged that liquor must be provided for it at the expense of state revenues.

As we have shown, Mississippi has provided the military clubs with cheaper liquor than its private retailers get and the clubs have resold it at a profit. No effort was made below to show that even cheaper alcoholic drinks for any or all of the clubs' patrons would aid the defense of the country. Even if the Defense Department's contention that military morale can't be sustained without low priced liquor is regarded as a truth that judges must accept without proof, the government made no case.

The government's argument that Mississippi's regulation prevented compliance with federal procurement policy by fixing minimum prices is wrong on both facts and the law. The statement at page 39 of the government's brief that Mississippi's regulation artificially inflated "the price at which the military facilities could otherwise obtain their liquor" is pure fiction. No evidence was offered as to what the price would have been absent the regulation and it might well have been higher than it was. Equally untrue is the government's page 39 assertion that the regulation, in effect, "sets a floating minimum price level which is 17 to 20% above the most advantageous price".¹³ In fact

¹³ A crap game is said to "float" when it moves. So is the gold price of the dollar when it fluctuates. Anything at once both "set" and "floating" defies linguistic analysis.

Mississippi sets no price for any suppliers product. Each supplier sets his own price and there was no showing in the record made below that there was not vigorous price competition between suppliers or between their various brands of distilled spirits and wine, whether sold to the military or to private retailers. If the "most advantageous price" meant a competitive price, the regulation deprived no one of such a price. If, on the other hand, the "most advantageous price" meant a price lower than the economics of wholesale distribution permit, then no Mississippi retailer got it or could reasonably expect to have it.

The government's reliance on the *Paul* case (Brief, p. 35), to show that the nonappropriated fund instrumentalities involved here are legally bound by the statutory competitive procurement standards controlling treasury purchases, is mistaken. That case plainly holds that they are not. *Paul v. United States*, 371 U.S. 245, 269.¹⁴ The Court's caveat that the state's power to regulate price must antedate the acquisition of the bases where the nonappropriated fund agencies operate is true here. Mississippi's power to regulate liquor prices was granted by the 21st Amendment in 1933. The state did not choose to abandon total prohibition for commercial regulation until 1966, but that choice was available during each of the thirty-two previous years. While the instant case involves no state establishment of minimum prices, even if it had, the *Paul* case alone would require affirmance.

¹⁴ The Court said "But since there is no conflicting federal policy concerning purchases and sales from nonappropriated funds, we conclude that the current price controls over milk are applicable to these sales, provided the basic state law authorizing such control has been in effect since the times of these various acquisitions."

As this Court has just pointed out, the 21st Amendment undoubtedly strengthens the case for upholding state control of the liquor traffic against competing constitutional claims. *California v. LaRue*, No. 71-36, — U.S. —, decided December 5, 1972. Slip opinion, p. 6. The competing constitutional claim pressed against Mississippi is for a military defense of the country, dependent upon supplying members of the Armed Forces, their families, and their guests, with even cheaper alcoholic beverages than Mississippi has generously provided. Surely the Constitution of the United States allows enough respect for the sovereign rights of the member states to bar such a gross perversion of the letter and intent of the 21st Amendment.

We respectfully submit that the decision of the Court below should be affirmed.

Respectfully submitted,

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